IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

JUDGMENT
IN
S.B. CRIMINAL JAIL APPEAL NO.1051/2005

Narendra Sharma @ Pappu S/o Mahendra Sharma
...Accused-Appellant
Versus
The State of Rajasthan through P.P.
...Respondent

Date of Judgment ::: 23rd March, 2007

PRESENT
HON'BLE MR. JUSTICE NARENDRA KUMAR JAIN

Shri Prakash Thakuria, Counsel for accused-appellant
Smt. Nirmala Sharma, P.P., for the State

//Reportable//

By the Court:-

Accused Narendra Sharma @ Pappu S/o Mahendra Sharma preferred this appeal challenging his conviction and sentence passed by the Additional Sessions Judge (Fast Track), Alwar, in Sessions Case No.45/2003, whereby he was convicted under Sections 328 and 397 read with Section 120-B of the Indian Penal Code (for short, 'the IPC') to seven years rigorous imprisonment and a fine of Rs.1,000/-; in default of payment of fine, to further undergo three months additional rigorous imprisonment.

Briefly stated the facts of the case are that a written-report (Exhibit P-3) was lodged on 26.5.2002

at Police Station, Kotwali – Alwar, by Babulal Meena (PW-6) S/o Navratan, stating therein that on 24.5.2002 her sister-in-law (Bhabhi) fell down from a tree and on that account she sustained injuries, therefore, they brought her to the Government Hospital for treatment. On 25.5.2002, when they were taking their meals in-front of the hospital, at about 4.00 PM one 35 to 40 years old person came there and told them that he would arrange IT Card for them and thereby they may be able to get free medicines and meals from the hospital itself. He further told us to bring our ration-card for that purpose. On his saying, he went to his village and brought the ration card. That person came back on 26.5.2002 at about 7'O clock in the morning accompanied with one another person, who was introduced by him as his younger brother, and asked them about the ration-card; we replied that it has been summoned. On this, he told them that he has to go to his village today; he further told that this is his younger brother and asked them to go with him to immediately arrange for one Photostat copy of the ration-card. Thereupon, he sent his brother-in-law (gainer) to immediately arrange for one Photostat copy of ration-card; and then he (complainant), his father Navratan and that person remained in the hospital

itself. Thereafter that person told him that he will take his father with him as he is an old person and Doctor will prepare a card immediately on seeing the old man, and thus his father went with that person. He also told them that his younger brother Narendra Sharma is already with them and in case there is any need of anything then they may tell him. He disclosed his name as Ramesh Chand Sharma. Thereafter Narendra Sharma tried to run away but they caught hold of him and asked him about the complainant's father. Narendra told him that he does not know anything about Ramesh Chand Sharma and he is not his brother. They told Narendra that in the morning he was introduced as his younger brother and now why he is denying. Thereafter at about 2.30 PM two persons brought complainant's father in a tempo in unconscious condition and only thereafter they came to know that a cash amount of Rs.21,000/- and gold-earrings weighing ½ tola (one Tola measures about twelve grams) of his father were stolen. On the basis of this written-report. an FIR No.220/2002 was registered under Sections 328, 379 and 120-B, IPC.

After completion of investigation, the police filed a challan against accused-appellant under Sections 328, 379 and 120-B, IPC. Ramesh Chand Sharma

absconded and could not be arrested, therefore, was declared absconder.

Initially the accused was tried by the Court of Chief Judicial Magistrate. Thereafter, on coming to the notice of the said Court that the offence under Section 328, IPC, is triable by the court of Sessions Judge, the case was accordingly transferred. The trial court framed charge against the accused under Sections 120-B, 397 and 328, IPC. The accused denied the charges and claimed to be tried.

The learned trial court, after considering the submissions of both the parties and the evidence available on the record, acquitted the accused-appellant from the offence under sections 328 and 397, IPC, but convicted and sentenced him under Sections 328 and 397 read with Section 120-B, IPC, as mentioned above.

The learned counsel for the appellant contended that all the prosecution witnesses in the present case were interested witnesses, which have been wrongly believed by the trial court. The prosecution has failed to prove any relation in between the accused with co-accused Ramesh so as to prove the appellant to be a member of conspiracy with co-accused Ramesh. The prosecution has also failed to prove any agreement or

meeting of mind of the appellant with co-accused Ramesh. While referring the prosecution evidence, it was also contended that Navratan went with co-accused Ramesh and allegation of committing offence is against Ramesh and no specific overt act has been attributed against the present accused and he has wrongly been convicted. The site-plan was not prepared in the case. Recovery of cash amount of Rs.21,000/- or golden-earrings has not been made from the accused-appellant. Therefore, there is no corroborative evidence in the present case. It is further contended that a glass of juice with poison was given to Navratan, but, as per the FSL Report (Exhibit P-8), no poison was administered as a negative report was given by public analyst. Relying upon these arguments the learned counsel for the accused-appellant contended that the learned trial court has committed an illegality in convicting the accused-appellant for the above offence and accused is liable to be acquitted.

The learned counsel for the accused-appellant lastly contended that the accused-appellant has already remained in jail for about four years and ten months as he is in jail since 26.5.2002, and, in case, this court does not agree with his contention and accused is not acquitted then, at least, his sentence

of imprisonment may be reduced to a period of sentence of imprisonment already undergone by him.

The learned counsel for the State, on the other hand, contended that there is sufficient evidence to prove the agreement in between Ramesh and accused-appellant Narendra to commit the offence of robbery. There are eye-witnesses in the case to prove the charge against the accused. The judgment of the trial court has been supported and it is contended that there is no merit in this appeal and the same deserves dismissal.

I have considered the submissions of the learned counsel for both the parties and minutely scanned the impugned judgment as well as the record of trial court.

The accused-appellant was charged with the offence under Section 120-B, 397 and 328, IPC. However, after appreciating the prosecution evidence, the learned trial court recorded a finding that the prosecution has failed to prove the case against accused Narendra Sharma for the offence under Sections 328 and 397, IPC, but convicted him under Sections 328 and 397 IPC read with Section 120-B IPC. The question for consideration before this court is whether, in the facts and circumstances of the present case, the

prosecution has undoubtedly proved that the appellant Narendra Sharma and co-accused Ramesh were members of conspiracy to commit the crime in respect of offence under sections 328 and 397 IPC. For ready reference Sections 328, 397 and 120-B IPC are reproduced as under:-

> “328. **Causing hurt by means of poison, etc., with intent to commit an offence**.- Whoever administers to or causes to be taken by any person any poison or any stupefying, intoxicating or unwholesome drug, or other thing with intent to cause hurt to such person, or with intent to commit or to facilitate the commission of an offence or knowing it to be likely that he will thereby cause hurt, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.”
>
> “397. **Robbery, or dacoity, with attempt to cause death or grievous hurt**.- If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person, or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.”
>
> “120B. **Punishment of criminal conspiracy**.- (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, (imprisonment for life) or rigorous imprisonment for a term

> of two years or upwards, shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.
>
> (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment of either description for a term not exceeding six months, or with fine or with both."

The language of Section 120-A and 120-B, IPC, makes it clear that that conspiracy is a substantive offence and render the mere agreement to commit an offence punishable. Even if an overt act does not take place pursuant to the illegal agreement, the offence of conspiracy would still be attracted. The gist of the offence is an agreement to break the law. The parties to such an agreement will be guilty of criminal conspiracy, though the illegal act agreed to be done has not been done. The unlawful agreement and not its accomplishment is the essence of the crime of conspiracy. The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do it, nor in inciting others to do it, but in the

forming of the scheme or agreement between the parties.

The definition and offence of criminal conspiracy in the context of Section 120-A, IPC, was considered by Hon'ble the Supreme Court in **K.R. Purushothaman v. State of Kerala (2005) 12 SCC 631**, and after referring/considering its earlier judgments, the Hon'ble Supreme Court held as under:-

> "13. To constitute a conspiracy, meeting of minds of two or more persons for doing an illegal act or an act by illegal means is the first and primary condition and it is not necessary that all the conspirators must know each and every detail of the conspiracy. Neither is it necessary that every one of the conspirators takes active part in the commission of each and every conspiratorial acts. The agreement amongst the conspirators can be inferred by necessary implication. In most of the cases, the conspiracies are proved by the circumstantial evidence, as the conspiracy is seldom an open affair. The existence of conspiracy and its objects are usually deduced from the circumstances of the case and the conduct of the accused involved in the conspiracy. While appreciating the evidence of the conspiracy, it is incumbent on the court to keep in mind the well-known rule governing circumstantial evidence viz. each and every incriminating circumstance must be clearly

established by reliable evidence and the circumstances proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn, and no other hypothesis against the guilt is possible. Criminal conspiracy is an independent offence in the Penal Code. The unlawful agreement is sine qua non for constituting offence under the Penal Code and not an accomplishment. Conspiracy consists of the scheme or adjustment between two or more persons which may be express or implied or partly express or partly implied. Mere knowledge, even discussion, of the plan would not per se constitute conspiracy. The offence of conspiracy shall continue till the termination of agreement.

14. Suspicion cannot take the place of legal proof and prosecution would be required to prove each and every circumstance in the chain of circumstances so as to complete the chain. It is true that in most of the cases, it is not possible to prove the agreement between the conspirators by direct evidence but the same can be inferred from the circumstances giving rise to conclusive or irresistible inference of an agreement between two or more persons to commit an offence .It is held in *Noor Mohd. Mohd. Yusuf Momin v. State of Maharashtra (1970) 1 SCC 696 : 1970 SCC (Cri) 274 : AIR 1971 SC 885, that : (SCC pp.699-700, para 7)*

> “[I] In most cases proof of conspiracy is largely

> inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material."

15. It is cumulative effect of the proved circumstances which should be taken into account in determining the guilt of the accused. Of course, each one of the circumstances should be proved beyond reasonable doubt. The acts or conduct of the parties must be conscious and clear enough to infer their concurrence as to the common design and its execution. While speaking for the Bench it is held by P. Venkatarama Reddi, J. in *State (NCT of Delhi) V. Navjot Sandhu (2005) 11 SCC 600 : 2005 SCC (Cri) 1715 : JT (2005) 7 SC 1, (p.63) as follows: (SCC pp.691-92, para 103)*

> "103. We do not think that the theory of agency can be extended thus far, that is to say, to find all the conspirators guilty of the actual offences committed in execution of the common design even if such offences were ultimately committed by some of them, without the participation of others. We are of the view that those who committed the offences pursuant to the conspiracy by indulging in various overt acts will be individually liable for those offences in addition to being liable for criminal conspiracy; but, the non-participant conspirators cannot be found guilty of the

> offence or offences committed by the other conspirators. There is hardly any scope for the application of the principle of agency in order to find the conspirators guilty of a substantive offence not committed by them. Criminal offences and punishments therefor are governed by the statute. The offender will be liable only if he comes within the plain terms of the penal statute. Criminal liability for an offence cannot be fastened by way of analogy or by extension of a common law principle."

The Hon'ble Supreme Court in **Sanjiv Kumar v. State of Himachal Pradesh – AIR 1999 SC 782** also considered the provisions of Section 120-B, IPC, and held as under:-

> "19. Coming to the question of charge under Section 120-B, I.P.C. to establish a conspiracy between accused Sanjiv Kumar and accused Kamlesh, apart from the relationship, namely Sanjiv was the nephew of Kamlesh the prosecution evidence is totally silent to establish a criminal conspiracy between them for committing the murder of deceased Rajesh. The offence under Section 120-B is an agreement between the parties to do a particular act. There is not an iota of material to establish the alleged agreement between accused Sanjiv Kumar and

> accused Kamlesh. In the absence of such evidence the mere fact that Sanjiv Kumar was the nephew of Kamlesh cannot be held to be sufficient to led to an inference of conspiracy. Association of Sanjiv Kumar with Kamlesh being a relation is not enough to establish that both of them entered into a conspiracy to kill deceased Rajesh. In the aforesaid premises, the learned counsel appearing for the respondent State was right in his submission that the charge of conspiracy cannot be sustained. We accordingly, set aside the conviction of accused Sanjiv Kumar as well as of accused Kamlesh under Sections 302/120-B of Indian Penal Code.

In **Vijayan v. State of Kerala – AIR 1999 SC 1086**, the Hon'ble Apex Court held that it is no doubt true that it is difficult to establish conspiracy by direct evidence and, therefore, from established facts inference could be drawn but there must be some material from which it would be reasonable to establish a connection between the alleged conspiracy and the act done pursuant to the said conspiracy.

The appellant is mainly convicted with the aid of Section 120-B, IPC, therefore, it is necessary to discuss and decide whether there was an agreement in between the appellant and co-accused Ramesh to commit the offence of robbery by looting/snatching the cash

amount of Rs.21000/- and gold-earrings of Navratan (PW-7).

As per the first-information-report (Exhibit P-3), statements of PW-5 Mangilal, PW-6 Babulal, PW-7 Navratan and PW-8 Mantu, it is clear that on 24.5.2002 accused Ramesh came and met these four persons in the General Hospital at Alwar and told them that he would arrange IT Card for them so that they may get free medicines and meals from the Hospital itself and told them to bring their ration-card. PW-6 Babulal went to his village and brought the ration-card. On 26.5.2002 accused Ramesh came at about 7'O clock in the morning to them along with accused-appellant Narendra Sharma and asked them about summoning of the ration-card. Co-accused Ramesh introduced the present appellant Narendra Sharma as his brother. Ramesh told them to immediately arrange for one Photostat copy of the ration card. PW-5 Mangilal was sent with the appellant Narendra to get one Photostat copy of the ration-card prepared. Meanwhile Navratan and Babulal went with Ramesh. Ramesh told Babulal that Navratan is an old person and Doctor will prepare the required certificate immediately on seeing the old person i.e. Navratan. Therefore, Ramesh and Navratan both went for the required certificate.

PW-7 Navratan, in his statement, stated that Narendra brought a glass of juice and mixed something therein and told him to drink; when he took the juice, he became unconscious and only after three to four days, when he became conscious, came to know that the cash amount of Rs.21,000/- and gold-earrings are missing. PW-7 Navratan has also stated that Ramesh was also there and told him that if he wants to sleep then he may sleep. It is relevant to mention that accused Ramesh came and met Babulal, Navratan, Mantu and Mangilal on 24.5.2002 and 26.5.2002. The accused Narendra Sharma also came with Ramesh on 26.5.2002, who was introduced as his brother and the accused-appellant never controverted that he is not his brother. Although in the matter of criminal conspiracy, it is very difficult to bring direct evidence to show the meeting of minds of accused-persons or agreement in between them to commit a crime but the same can be inferred from the circumstantial evidence. Arrival of Narendra with Ramesh on 26.5.2002 and introducing him by Ramesh to be his brother clearly shows the meeting of mind of accused-persons to commit the offence with victim Navratan (PW-7). In these circumstances from the prosecution evidence it is fully proved that accused Ramesh and Narendra both

were members of criminal conspiracy to commit the illegal act.

Now the question arises is whether the trial court rightly convicted the appellant for the offence under Sections 328 and 397 read with Section 120-B, IPC.

From the statement of PW-7 Navratan it is clear that something was mixed in the glass of juice, which was given him to drink, by accused-persons and thereafter he became unconscious. The sample of vomiting of victim Navratan (PW-7) was sealed vide Exhibit P-2 on 1.7.2002 and the same was sent for chemical examination vide receipt of FSL (Exhibit P-6) dated 17.7.2002. Exhibit P-8 is the report of FSL dated 30.10.2002. It reports negatively. The result of examination as reported in Exhibit P-8 reads as under:-

> "RESULT OF EXAMINATION:-
> On chemical examination, portions of Gastric lavage (1) from packet marked (A) gave negative tests for metallic poisons, ethyl and methyl alcohol, cyanide, lalkaloids, barbiturates, tranquillizers and insecticides."

On the basis of the above negative report, the learned counsel for the appellant contended that no poison was administered, therefore, neither offence

under Section 328, IPC, is made out, nor the offence under Section 397 IPC is made out. It is true that as per the FSL Report (Exhibit P-8) the metallic poison was not found and a negative report has been received, but Exhibit P-2 will show that alleged sample of some liquid dated 26.5.2002 was seized and sealed on 1.7.2002 i.e. after one month and five days whereas juice was given to PW-7 Navratan on 26.5.2002. The sample seized vide Exhibit P-2 was sent to FSL after 17 days i.e. 17.7.2002 and report was given on 30.10.2002. There is nothing on record that required chemicals to maintain it as it is, were dropped or mixed in the liquid alleged to have taken on 26.5.2002 and the said liquid remained as it is during the period from 26.5.2002 to 1.7.2002 when it was seized, therefore, correct report could not have been expected from the laboratory, therefore, on the basis of FSL report alone it can not be held that poison or like powder was not administered on the person of Navratan. The oral evidence in this regard is relevant and necessary to be considered.

PW-1 Mohanlal was examined in the present case on behalf of the prosecution, who stated that on 26.5.2002 he was Medical Officer in General Hospital, Alwar and he admitted Navratan in unconscious

condition, and, as per his examination, a poisonous thing was given to him and accordingly the patient was given treatment. The patient became conscious on 1.6.2002 and he was discharged on 2.6.2002.

PW-7 Navratan has also stated that on 26.5.2002 the accused offered him a glass of juice and when he drunk it, he became unconscious and came in consciousness only on 1.6.2002. The statement of PW-1 Dr. Mohanlal and PW-7 Navratan are corroborated by the statements of PW-5 Mangilal, PW-6 Babulal, PW-8 Mantu also. Therefore, from the prosecution evidence it is clear that something poisonous, may not be fatal, was administered by accused to victim Navratan by mixing the same in the juice.

After considering the prosecution evidence available on the record, I find that the trial court has rightly convicted the accused-appellant under Section 328 read with Section 120-B IPC.

Now, I proceed to consider the question in respect of offence of robbery under Section 397 IPC whether it is made out or not.

Robbery has been defined under Section 390, IPC. Theft is “robbery” if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property

obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint. The punishment for robbery is provided under Section 392 IPC.

So far as offence under Section 397, IPC, is concerned, it is necessary that the offender must use any deadly weapon to cause grievous hurt to any person or to attempt to cause death or grievous hurt. The prosecution has not produced any evidence that any deadly weapon was used by the accused person to cause grievous hurt or attempt to cause death.

It is also clear from the FSL report that metallic poison was not given to victim Navratan which can be said to be sufficient to cause death. PW-1 Dr. Mohanlal stated that eye-balls (pupils) were narrowed which could be only by way of administering poison of insecticides. However, he has not stated specifically that by use of such poisonous articles there was possibility of the death of a person. Undoubtedly it is clear that deadly weapon was not used and the alleged powder was not given to cause death of Navratan so as to attract the offence under Section 397, IPC, and it was given only to see that Navratan

may become unconscious and they may loot him, therefore, I am of the view that the trial court has committed an illegality in convicting the accused-appellant under Section 397, IPC, read with Section 120-B, IPC.

However, from the prosecution evidence it is clear that accused persons committed offence of robbery and the appellant being a member of criminal conspiracy committed an offence punishable under Section 392 read with Section 120-B, IPC.

Now, the question arises in respect of sentence of imprisonment to be awarded for the offence under Sections 328 and 392 read with Section 120-B IPC.

The accused-appellant has already remained in jail for about four years and ten months, but, after considering all the facts and circumstances of the case, instead of reducing his sentence of seven years imprisonment to a period of imprisonment already undergone by him, I think that ends of justice will meet in case the sentence of five years rigorous imprisonment is awarded against the accused-appellant.

Consequently, the appeal is partly allowed. The conviction of the accused-appellant by trial court under Section 328 read with Section 120-B, IPC, is maintained. The conviction of appellant by trial court

under Section 397 read with Section 120-B, IPC, is set aside, but he is convicted for the offence under Section 392 read with Section 120-B, IPC, and he is sentenced under Sections 328, 392 read with Section 120-B, IPC, to five years rigorous imprisonment and a fine of Rs.1000/-; in default of payment of fine, to further undergo fifteen days simple imprisonment.

(Narendra Kumar Jain) J.

//Jaiman//